No. 5921

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

KAICHIRO SUGIMOTO,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

APPELLANT'S POINTS AND AUTHORITIES.

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STATEMENT OF FACTS.

The facts are not disputed. Appellant, now approximately forty years of age and a male native and subject of Japan, was *lawfully admitted to the Territory of Hawaii on July 29, 1907,* when almost immediately thereafter he came to the Mainland of the United States at San Francisco, where he resided ever since, for approximately twenty-one years and until July 18, 1928; "when he departed for Japan for a visit from which he is now returning," in March, 1929.

Prior to his departure he had, for many many years comprising nearly the whole of the twenty-one years, been in various lines of business, and he was,

at the time of the departure, and is now in a restaurant business of substantial proportions employing considerable help. He had married and has a wife and two minor American-born children as well as minor stepchildren, all residing at his home in the City and County of San Francisco. While he may have been a laborer at the time of his original entry to the Mainland, he was not, for the purpose of this record, a laborer skilled or unskilled during, say, any of the period of ten years last past.

FINDINGS OF THE BOARD.

The Board of Special Inquiry found: (a) "This applicant is returning from a temporary visit abroad after having lived in the United States continuously for approximately twenty-one years" (R. p. 5); (b) "This applicant is applying for admission as a returning restaurant keeper under Section 4 (b) of the Act of 1924, and presented a non-quota visa No. 365 dated at Yokohama, Japan, March 12, 1929, and a Japanese passport showing him to be returning to the United States from a temporary visit abroad" (R. p. 4); (c) That he was lawfully admitted to Hawaii July 29, 1907, ex "S/S Nippon Maru;" (d) It was also found that he was literate and in sound physical condition. (R. p. 5.)

Certain other matters in connection herewith are not subject to dispute: (1) Appellant, prior to the initiation of his visit in July, 1928, was immune from deportation; (2) Appellant could, at any time *prior to the enactment of the 1924 Act,* have returned to

Japan for a visit and re-entered the United States on a passport of the Japanese Government.

REASON ASSIGNED FOR EXCLUSION.

It is admitted that appellant's papers are in order and that he is now seeking admission under Section 4(b) of the Immigration Act of 1924 as "an immigrant previously lawfully admitted to the United States who is returning from a temporary visit abroad." And it is likewise admitted, and the Department has ruled, that he is entitled to, and may, re-enter or return to Hawaii. (R. pp. 7, 15.) It is admitted that he is "an immigrant * * * who is returning from a temporary visit abroad"; and it is admitted that he was *previously lawfully admitted to the Territory of Hawaii.*

But he is excluded *solely* upon the ground that he is not "an immigrant *previously lawfully admitted to the United States.*" (R. p. 14.) This position is maintained by the Immigration Service and by the opinion of the lower court in the face of the admission that he was previously lawfully admitted to Hawaii which, under the 1924 Act, is *expressly made a part of the United States.* We believe this position to be untenable and in direct conflict with the unequivocal language of the 1924 Act.

I.

PETITIONER WAS PREVIOUSLY LAWFULLY ADMITTED TO THE UNITED STATES.

We emphatically urge that for the purposes of the 1924 Act, and admittedly we are concerned with no other Act, the appellant is an immigrant previously lawfully admitted *to the United States.* For the first time in the history of United States immigration, there was created, by the Act of 1924, a new class or designation; and that class or designation is "aliens ineligible to citizenship." The 1924 Act, for the first time, stated that aliens ineligible to citizenship might only be admitted to the United States when they fell within certain exceptions. (See Section 13 of the Immigration Act of 1924, (8 U. S. C. A. Sec. 213).) The only exception referred to in subdivision (c) of Section 13 with which we are concerned is subdivision (b) of Section 4 of said Immigration Act, (8 U. S. C. A. Sec. 204, hereinbefore quoted) which provides for and defines non-quota immigrants. In other words, combining the two sections and quoting therefrom, it would appear "no alien ineligible to citizenship shall be admitted to the United States unless such alien is admissible as a non-quota immigrant under the provisions of subdivision (b) * * *"— namely *"an immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad."*

That he is "an immigrant" is apparent from the definition contained in Section 3 of the 1924 Immigration Act (8 U. S. C. A. Sec. 203); *that he is returning from a temporary visit abroad is admitted.* Now

Section 28 of the Act, subdivision (a) thereof (8 U. S. C. A. Sec. 224), containing various definitions for the purposes of the 1924 Act, defines

> "The term 'United States,' when used in a geographical sense, means the states, the territories of Alaska and Hawaii, the District of Columbia, Porto Rico and the Virgin Islands; and the term 'continental United States' means the states and the District of Columbia."

For geographical purposes, then, and that is the only purpose we are concerned with, *your appellant, having been previously lawfully admitted to the Territory of Hawaii, a part of the United States, was previously lawfully admitted to the United States.* That is the plain intendment of the 1924 Act. To say that there was intended a previous lawful admission into the "Continental United States" is to do violence to the language of Section 28 of the 1924 Act just hereinabove referred to; particularly in view of the fact that that very section draws a distinction between *"United States"* on the one hand and *"Continental United States"* on the other hand. It can hardly be contended that Congress intended any such construction of subdivision (b) of Section 4 when it, in the very same act, drew a distinction between the term "United States" and the term "Continental United States." If it intended that it should be necessary to show previous lawful entry into the "Continental United States" it must be assumed that Congress would have employed that term since it had before it and was using in the one act both terms.

It is very apparent that the Department of Labor is reaching out for a construction and searching for

a meaning beyond the statute itself, and this in a case where the language of the statute is plain and unambiguous and the meaning clear and unmistakable. The Board of Special Inquiry excluded the appellant because there was no proof of his having *"been legally admitted to the U. S."* The Board of Review fell into the same error, saying that it appeared that he was not *"regularly admitted to the Mainland,"* and that he *"entered the Mainland illegally;"* and further, that *"he is an alien who was not previously admitted to Continental U. S."* And in their second order, the Board of Review stresses the point that petitioner was *"not lawfully admitted to the Mainland,"* and that *"he was never previously lawfully admitted to the Mainland."* (R. pp. 13, 14, 15.) The points and authorities of the Government fall into the same error.

In short, all of them, in order to argue the exclusion or deportation of the appellant, are forced into the use of language not found in the 1924 Act. Subdivision (b) does not speak of previous lawful entry into the "Continental United States" or admission "to the Mainland." *These terms are all supplied by the Department and clearly involves legislation on their part rather than administration.*

It is said, on the subject of statutory construction (25 *R. C. L.* 962):

> "* * * When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning. This principle is to be

adhered to notwithstanding the fact that the court may be convinced by extraneous circumstances that the legislature intended to enact something very different from that which it did enact. * * * No motive, purpose, or intent can be imputed to the legislature in the enactment of a law other than such as are apparent upon the fact and to be gathered from the terms of the law itself. A secret intention of the law making body cannot be legally interpreted into a statute which is plain and unambiguous, and which does not express or imply it. Seeking hidden meanings at variance with the language used is a perilous undertaking which is quite as apt to lead to an amendment of a law by judicial construction as it is to arrive at the actual thought in the legislative mind. * * * They (courts) cannot read into a statute something that is not within the manifest intention of the legislature as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret."

And again on page 957:

"* * * Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself."

And further on page 964:

"* * * There is a marked distinction between liberal construction of statutes, by which courts, from the language used, the subject matter, and the purposes of those framing them, find out their true meaning, and the act of a court in ingrafting upon a law something that has been omitted, which the court believes ought to have been embraced. The former is a legitimate and recognized rule of construction, while the latter is judicial legislation, forbidden by the constitutional provisions distributing the powers of gov-

ernment among three departments, the legislative, the executive and the judicial."

In the teeth of these universally applicable principles, there is no warrant in law for a departmental construction reading into the act the language *"previously lawfully admitted to the Continental United States or to the Mainland."* Even with the realization in mind that in immigration matters and regulations the department and the decisions concerning the same not infrequently strain the English language, yet there is no authority in the department to make regulations in conflict with the congressional acts. As stated in *U. S. ex rel. Pantoja,* 29 Fed. (2nd) 586,— the regulations might lawfully provide for certain matters but "they could not further curtail human liberty than as authorized by act of Congress."

Note that the Department, after great labor, finds itself using in its decisions and findings the language *not of the 1924 Act,* but language to the effect that appellant was not previously lawfully admitted to the "Continental United States" or to the "Mainland." They could not fit the existing statute to their findings or their findings to the existing statute. In short, they could not find or decide in the language of the statute and exclude the appellant. That certainly is a confession not only that the statute does not fit the case but moreover that they are doing a bit of legislating on their own.

The act in question was enacted by Congress in 1924. In 1924, the appellant was both here "in the United States" and here in the "Continental United States" as defined by that Act. He was here immune

from any deportation. When Congress enacted the 1924 law, it gave the appellant the *right to go and come non-quota* for it did not restrict or limit such right to those legally admitted in the "Continental United States" or "Mainland" but to those legally admitted *in the United States*. The Congress will be presumed to have had before it all the facts and to have intended just what it enacted.

ONLY ONE ENTRY INTO UNITED STATES.

In the case last cited, the phrase "in the United States" was the subject of the decision. There the alien, after entry and unlawfully overstaying his sixty day limit, shipped on an American vessel which, by a fiction, was American territory and touched at Japanese, Chinese and Mexican ports. The court said (italics ours):

> "The concept that he has not been out of the country is clear enough on the fiction of which we have spoken. If his second voyage is a second entry into this country, *from what country does he come;* and, if he is to be deported, what is the country 'whence he came.'
>
> "* * * 'In the United States' means remaining within its territorial limits. For many purposes, however, including an interpretation of the immigration law, an American vessel is American soil. When, therefore, one who is in the United States boards the American vessel, and remains on board of her until her return to her home port, he cannot be classed *as an alien immigrant 'coming from' any other country,* no matter at how many foreign ports the vessel may have touched, *for he has never, for immigration nor for many other purposes, been out of the United States.*"

For the purpose of the instant case, it is necessary to consider but one qualifying element, and that is a previous lawful admission *"in the United States."* That element is present. There is nothing in the act requiring that this shall have reference only to the last entry, *but be that as it may there is only one entry into the United States.* The 1924 Act deals entirely and exclusively with immigrants. As an immigrant, the appellant *entered but once.* He was not thereafter out of the United States. Not only was he continuously thereafter in the United States, as clearly defined by the 1924 Act, but further his coming from Hawaii to the Mainland was not an immigration; for immigration, as defined by the 1924 Act, Section 3 thereof, is the coming of an alien from a country outside the United States. The clear import of the case last cited is that the appellant was never, after his entry at Hawaii, outside of the United States. If he was, whence did he come from and what country is he to be deported to? (See *U. S. ex rel. Pantoja,* 29 Fed. (2nd) 586.)

We believe the conclusion irresistible that the appellant is entitled to his liberty and admission as an alien non-quota immigrant returning from a temporary visit abroad and previously lawfully admitted "to the United States" as defined by the 1924 Act. Any other construction of that act would be taking great liberty with the solemn pronouncement of Congress.

II.

USELESS ACT TO REQUIRE RETURN TO HAWAII.

The Department of Labor has ruled in the instant case that appellant was legally admitted to Hawaii and that he is now entitled to return to Hawaii. (R. p. 15.) That the appellant is not now, and has not for years been, a laborer is alleged in the petition for the writ herein and is apparently admitted by the decision of the court below as well as the Department of Labor. If, therefore, appellant were now in Hawaii or should later return to Hawaii, he, not now being a laborer, could immediately obtain form 546 granting him permission to board a steamer for the Mainland of the United States. We seriously urge that there is no law now in force, nor has there ever been any law, or perhaps, as we will later show, can there ever be any law to stop a Japanese lawfully admitted to Hawaii from coming to the United States Mainland except perhaps in the single instance where he is a laborer.

We, therefore, in this connection now make, as we did in the court below, the further point that it is useless and futile to require appellant to return to Hawaii. Sending him back merely means that he can immediately return on different papers. Therefore, if he voluntarily goes back to Hawaii it involves nothing more than the useless act and expense of returning to the United States.

In re Spinnella, 3 Fed. (2nd) 196, a relator presented himself for admission with a quota visa. The Board excluded him because they found that he was in the non-quota class and not in possession of a

non-quota visa. The Federal court ordered his discharge, however, upon the ground that it would be a useless act to send him back because "there is a favored maxim in equity that equity regards as done that which ought to be done. We speak of the view which equity would take of the matter because it is manifest that the Act of May 26, 1924, proceeds upon equitable principles and is intended to be administered accordingly; and this should be interpreted with proper regard of the spirit which prompted it." Appellant has expressed his desire and intention of immediately returning to the City and County of San Francisco, to his home, his wife, his children and his business; and in view of the authority last cited and the rule generally that useless acts will not be required of anyone, we believe it should weigh with the court in considering the discharge of appellant.

III.

NO LEGAL AUTHORITY FOR PRESIDENTIAL PROCLAMATION TO EXCLUDE TRAVEL FROM HAWAII.

We have advanced the point, in connection with the first phase of our argument, that as an immigrant appellant had entered the United States as defined by the 1924 Act but once previous to his detention at Angel Island. And this upon the theory that one coming from Hawaii to the Mainland is not, strictly speaking, or in legal parlance, an immigrant. We urge the further point, in connection with the Presidential Proclamation relied upon by the Government and by the opinion of the court below, that there has never

been, nor perhaps could there constitutionally be, any rule which would restrict the coming of anyone legally residing in Hawaii to the Mainland. The statutory provision which first appeared in the 1907 Immigration Act and later in the 1917 Immigration Act (8 U. S. C. A. Sec. 136 (h)) refers only to foreign countries "or to any insular possession of the United States or to the Canal Zone." It *does not refer to American territory proper.*

The Territory of Hawaii became an incorporated territory by act of Congress in 1900. It then acquired the same status as Alaska now has or as New Mexico once had—an incorporated territory of the United States entitled to the full and uniform protection that the Constitution of the United States affords to its states and to other incorporated territories. (*Hawaii v. Mankichi,* 190 U. S. 197, 211; 47 L. Ed. 1016, 1020; *Downes v. Bidwell,* 182 U. S. 244; 45 L. Ed. 1088; 21 Sup. Ct. Rep. 770; 38 *Cyc.* 195, 196.)

It is more than doubtful as to whether Congress could constitutionally have included the Territory of Hawaii in the statutory provision just referred to as enacted in 1907 and later in 1917. But suffice it to say that Congress did not so include the Territory of Hawaii but merely insular possessions and the Canal Zone. And in this connection we urge that the Presidential Proclamation enacted in 1907 as including the Territory of Hawaii along with insular possessions and the Canal Zone was done without the authority of Congress. And, *a fortiori,* the entry of appellant in 1907 from Hawaii to the Mainland was

not unlawful *even at that time* as urged by the Government and by the decision of the lower court.

IV.

POSITION TAKEN BY OPINION OF COURT BELOW SUSTAINING GOVERNMENT POSITION.

The opinion of the court below sustaining the Government falls into three parts—the *first part* ending at the beginning of the last paragraph on page 22 of the record, the *second part* ending at the top of page 24 of the record and the balance of the decision comprising the *third part.*

Now under the 1924 Act, the presence of two elements are necessary to insure the entry of the immigrant—*first,* he must be one "who is returning from a temporary visit abroad," *and second,* he must be "an immigrant previously lawfully admitted to the United States."

The first part of the opinion is not quite clear to us, but seems to be directed at the first element above set forth. Why it should go into that we are not clear because it seems to be admitted all the way through that appellant is one "who is returning from a temporary visit abroad." The fallacies of that portion of the opinion seem to lie in the unwarranted assumptions first, that appellant is seeking entry under some law *other than* the 1924 Act; and second, that the domicile to which he is returning is non-existent. But this is not true. Bearing in mind the 1924 Act, the fact would seem to be that the alien appellant is returning from a temporary visit abroad, to his home,

to his wife and children, to his business and to the place where for twenty years he has continuously resided. He is returning to a domicile in fact.

It does make a difference that appellant was, at the time of the enactment of the 1924 Act and for a long time prior thereto and continuously thereafter, making his home in the City and County of San Francisco because that is the very circumstance that enables him to come within the classification of *one who is returning from a temporary visit abroad.* Else he would have no place to "return from or to" and could not possibly come within the classification. And there is no Congressional act, past or present, which stops him from being within the express designation of one "who is returning from a temporary visit abroad." And, in fact, the Department of Labor actually found that he was one who was returning from a temporary visit abroad.

The second part of the opinion states (Rec. p. 22):

> "But it is urged on behalf of the alien that the illegality of his entry to the mainland in 1907 is immaterial in view of his lawful entry and admission to Hawaii. This contention is based upon the definition of 'United States' in sec. 28 (a), Immigration Act of 1924 (8 U. S. C. A., sec. 224a) * * *"

This is directed to a real issue of law in the case—that is, as to whether appellant was one who had been previously lawfully admitted to the United States as defined by the 1924 Act. The Government argues, in connection herewith, that appellant was not previously lawfully admitted to the United States *but only admitted to a part of the United States,* and the court

below, following that position, states that "the lawful admission to Hawaii is a restricted admission," which amounts to nothing more or less than the Government's statement that it was a lawful admission to only a part of the United States. This position leads the opinion into the further error of reading into subdivision (a) of Section 28 of the 1924 Act all of the previous immigration laws, and particularly the Immigration Act of 1907, in such a manner as to do violence to the very express terms of the 1924 Act.

Of course, the 1924 Act is "in addition to and not in substitution" of all of the previous immigration laws or acts. And were the 1924 Act silent on the subject, it might perhaps be argued that the 1907 Act would obtain.

But the 1924 Act is not silent. It does state that an immigrant may return from a temporary visit abroad *if he had been previously lawfully admitted to the United States* and defines the term *"United States,"* in that connection as *"the states, the territory of Alaska and Hawaii * * *."* No exception is made as to "restricted admissions or "admissions to part of that United States." Suppose the 1924 Act had provided expressly that certain aliens could enter. Could it be said that by virtue of this particular section (Sec. 25 of the 1924 Act) there would be any warrant in law for excluding them upon the ground that they were excludable by virtue of some other and former act or acts? In other words, all that is intended by Section 25 is that an alien may be excluded under previous acts notwithstanding there is no provision for his exclusion in the 1924 Act. But it is not intended that the provisions of preceding acts

should affect the express provisions of the 1924 Act. The 1924 Act is not "self repealing." The opinion violates all the known rules of statutory construction when it reads into Section 4 (b) of the Immigration Act of 1924 and Section 28 (a) of that Act an exception or restriction to the effect that it applies only to previous lawful entries to the "Continental United States."

How particularly absurd that is when you consider that both of the sections last referred to refer to "United States" and to "Continental United States" with a fine discrimination. Throughout the Act the terms "United States" and "Continental United States" are used as distinguished from each other. And the opinion certainly does violence to the terms of the two sections quoted when it puts into the mouth of Congress the exception referred to.

The third part of the opinion, while apparently admitting the soundness of the rule announced *in re Spinnella,* 3 Fed. (2nd) 196, and *ex parte Seid Soo Hong,* 23 Fed. (2nd) 847, to the effect that courts will not exclude aliens merely because they present the wrong papers when on the record they obviously are otherwise admissible, nevertheless erroneously holds that appellant is not entitled to the benefit of the legal principles therein announced.

The court, in that respect, did not meet our position. It is our claim, as made in the second subdivision herein, that it would be a useless act to require appellant to return to Hawaii only to then immediately go to the expense of returning to the Continental United States with Form 546 granting him permission to board a steamer for the Mainland

from Hawaii—and this upon the theory that there is no law preventing appellant, since he is no longer, and has not for some time been, a laborer, from coming to the Mainland from Hawaii at this time.

The opinion raises the point that he is not (Rec. p. 24) "an alien entitled to enter the United States solely to carry on trade under and in pursuance of a present existing trade of commerce and navigation." But we are not concerned with that. Appellant is conceded the right to be and reside in Hawaii; and the only possible obstruction in the way of his coming to the Mainland from Hawaii is the Presidential Proclamation which is *inapplicable to one who is not at the time a laborer.*

Therefore, irrespective of what his vocation may be, as long as he is not a laborer he would be entitled to enter with the proper papers from Hawaii to the Continental United States, and it is a vain and useless act, necessitating unnecessary expenditures to and from this territory, to demand that your appellant go back to Hawaii and re-enter with papers to which on the record before this court he is admittedly entitled to.

It is respectfully submitted that the order of the court below should be reversed and appellant discharged and allowed to enter.

Dated, San Francisco,
October 26, 1929.

BIANCHI & HYMAN,
Attorneys for Appellant.